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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9721]

RIN 1545-BM17

Segregation Rule Effective Date

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations under section 382 of the Internal Revenue Code (Code) that modify the effective date provision of recently published regulations. These regulations affect corporations whose stock is or was acquired by the Department of the Treasury (Treasury) pursuant to certain programs under the Emergency Economic Stabilization Act of 2008 (EESA).

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF**

PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: For dates of applicability, see §1.382-3(j)(17).

FOR FURTHER INFORMATION CONTACT: Stephen R. Cleary, (202) 317-5353 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Section 382

Section 382 of the Code provides that the taxable income of a loss corporation for a year following an ownership change may be offset by pre-change losses only to the extent of the section 382 limitation for such year. An ownership change occurs with respect to a corporation if it is a loss corporation on a testing date and, immediately after the close of the testing date, the percentage of stock of the corporation owned by one or more 5-percent shareholders has increased by more than 50 percentage points over the lowest percentage of stock of such corporation owned by such shareholders at any time during the testing period. A testing date is any date on which occurs any change in the ownership of loss corporation stock that affects the percentage of stock owned by any 5-percent shareholder (owner shift).

Pursuant to section 382(g)(4)(A), shareholders who own less than five percent of a loss corporation are aggregated and treated as a single 5-percent shareholder (a public group). In addition, new public groups may be created as a result of certain transactions under the segregation rules in the section 382 regulations. Any new public group is tracked separately from, and in addition to, the public group or groups that existed previously and is treated as a new 5-percent shareholder that increases its ownership interest in the loss corporation.

One particular segregation rule, which was imposed by §1.382-2T(j)(3)(i) of the Temporary Income Tax Regulations until it was superseded, required segregation when an individual or entity that owned five percent or more of the loss corporation transferred an interest in the loss corporation to public shareholders. After the sale, stock owned by a public group that existed immediately before the sale was treated separately from the

stock owned by the public group that acquired stock from the seller. This separate public group was treated as a new 5-percent shareholder. However, this rule was rendered inoperative by §1.382-3(j)(13), part of a set of regulations published in TD 9638 [78 FR 62418] on October 22, 2013. Under the new regulation, no new public group is created on the transfer of stock to the public shareholders; instead, the transferred stock is treated as acquired proportionately by the public groups existing at the time of the transfer.

Notice 2010-2 (2010-2 IRB 251 (December 16, 2009)) (see §601.601(d)(2)(ii)(b) of this chapter) provides guidance regarding the application of section 382 and other provisions of law to corporations whose instruments are acquired and disposed of by the Treasury pursuant to EESA. Notice 2010-2 relates to instruments acquired by Treasury pursuant to the following EESA programs: (i) the Capital Purchase Program for publicly-traded issuers; (ii) the Capital Purchase Program for private issuers; (iii) the Capital Purchase Program for S corporations; (iv) the Targeted Investment Program; (v) the Asset Guarantee Program; (vi) the Systemically Significant Failing Institutions Program; (vii) the Automotive Industry Financing Program; and (viii) the Capital Assistance Program for publicly-traded issuers. (These programs are collectively referred to as “Programs” in that Notice and in this preamble.)

Under Section III(G) of Notice 2010-2, a “Covered Instrument” is an instrument that is acquired by Treasury in exchange for an instrument that was issued to Treasury under the Programs, or is acquired by Treasury in exchange for another Covered Instrument. For most purposes of that Notice, a Covered Instrument is treated as though it had been issued directly to Treasury under the Programs.

Section III(E) of Notice 2010-2 provides the following rule to govern the sale by Treasury of stock of a corporation to public shareholders:

Section 382 treatment of stock sold by Treasury to public shareholders. If Treasury sells stock that was issued to it pursuant to the Programs (either directly or upon the exercise of a warrant) and the sale creates a public group (“New Public Group”), the New Public Group's ownership in the issuing corporation shall not be considered to have increased solely as a result of such a sale. A New Public Group's ownership shall be treated as having increased to the extent the New Public Group increases its ownership pursuant to any transaction other than a sale of stock by Treasury, including pursuant to a stock issuance described in §1.382-3(j)(2) or a redemption (see §1.382-2T(j)(2)(iii)(C)). Such stock is considered outstanding for purposes of determining the percentage of stock owned by other 5-percent shareholders on any testing date, and section 382 (and the regulations thereunder) shall otherwise apply to the New Public Group in the same manner as with respect to other public groups.

This rule was created to prevent a loss corporation from experiencing an owner shift when Treasury sells stock to public shareholders. By its terms, the rule relies on the assumption that the stock sale “creates a public group.” As explained earlier in this preamble, §1.382-2T(j)(3)(i), before it was superseded, required creation of a new public group when a 5-percent shareholder sold stock in a loss corporation to public shareholders. However, under §1.382-3(j)(13) as now in effect, such a transfer does not create a new public group.

The Treasury Department and the IRS became concerned that the elimination of the segregation rule described earlier in this preamble may have unintentionally rendered inoperative the rule in Notice 2010-2 that protects a loss corporation from an owner shift when Treasury sells stock that it held pursuant to the Programs to public shareholders.

The Temporary Regulations

On July 31, 2014, the Treasury Department and the IRS published final and temporary regulations (TD 9685) in the **Federal Register** (79 FR 44280). The temporary regulations modified the effective/applicability date rule of TD 9638 to except from the changes to the segregation rules in those regulations the sale by the Treasury Department to public shareholders of any “Program Instrument” (an instrument issued pursuant to a Program or a Covered Instrument). As a result, under the temporary regulations, a sale of stock by Treasury to the public creates a public group, and the rule of Section III(E) of Notice 2010-2 continues to apply as intended. This provision only affects the sale of a Program Instrument by the Treasury Department and does not affect the application of the segregation rule changes in TD 9638 to any other transactions involving stock of the corporations that participated in the Programs.

A notice of proposed rulemaking (REG-105067-14) cross-referencing the temporary regulations and incorporating the text of the temporary regulations was also published in the **Federal Register** (79 FR 44324) on July 31, 2014. No written comments were received in response to the notice of proposed rulemaking. No requests for a public hearing were received, and accordingly no hearing was held.

The Final Regulations

This Treasury Decision adopts the text of the temporary and proposed regulations without substantive change. As a result, the effective date modification provided in the temporary regulations is now a part of the permanent section 382 regulations, and the temporary regulations are removed.

Special Analyses

It has been determined that this final regulation is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that, if the regulations apply to any small entities, the effect will not be to increase their tax liability, but to prevent a potential increase in tax liability that might otherwise occur. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business, and no such comments were received.

Drafting Information

The principal author of these regulations is Stephen R. Cleary of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by revising the entry for § 1.382-3 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.382-3 also issued under 26 U.S.C. 382(g)(4)(C) and 26 U.S.C. 382(m).

* * * * *

Par. 2. Section 1.382-3 is amended by revising paragraph (j)(17) to read as follows:

§1.382-3 Definitions and rules relating to a 5-percent shareholder.

* * * * *

(j) * * *

(17) Effective/applicability date. This paragraph (j) generally applies to issuances or deemed issuances of stock in taxable years beginning on or after November 4, 1992. However, paragraphs (j)(11)(ii) and (j)(13) through (15) of this section and Examples 5 through 13 of paragraph (j)(16) of this section apply to testing dates occurring on or after October 22, 2013, other than with respect to the sale of a Program Instrument by the Treasury Department. For purposes of this paragraph (j)(17), a Program Instrument is an instrument issued pursuant to a Program, as defined in Internal Revenue Service Notice 2010-2 (2010-2 IRB 251 (December 16, 2009)) (see §601.601(a)(2)(ii)(b) of this chapter), or a Covered Instrument, as defined in that Notice. Taxpayers may apply paragraphs (j)(11)(ii) and (j)(13) through (15) of this section and Examples 5 through 13 of paragraph (j)(16) of this section in their entirety (other than with respect to a sale of a Program Instrument by the Treasury Department) to all testing dates that are included in a testing period beginning before and ending on or after October 22, 2013. However, the provisions described in the preceding sentence may not be applied to any date on or before the date of any ownership change that occurred before October 22, 2013, under

the regulations in effect before October 22, 2013, and they may not be applied as described in the preceding sentence if such application would result in an ownership change occurring on a date before October 22, 2013, that did not occur under the regulations in effect before October 22, 2013. See §1.382-3(j)(14)(ii) and (iii), as contained in 26 CFR part 1 revised as of April 1, 1994 for the application of paragraph (j)(10) of this section to stock issued on the exercise of certain options exercised on or after November 4, 1992, and for an election to apply paragraphs (j)(1) through (12) of this section retroactively to certain issuances and deemed issuances of stock occurring in taxable years prior to November 4, 1992.

* * * * *

§1.382-3T (Removed)

Par. 3. Section 1.382-3T is removed.

John M. Dalrymple,
Deputy Commissioner for Services and Enforcement.

Approved: May 13, 2015.

Mark J. Mazur,
Assistant Secretary of the Treasury (Tax Policy).

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